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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JULIAN CASTRO DIAZ NAVA, Defendant and Appellant.	H045085 (Monterey County Super. Ct. No. SS160776A)

Defendant Julian Castro Diaz Nava argues that the trial court engaged in unlawful plea bargaining when, pursuant to a plea agreement that promised Nava would not receive a sentence longer than six years in prison, the trial court gave Nava the option of either receiving a prison sentence or serving a probationary sentence if he waived a number of custody credits. The Attorney General counters that Nava's appeal must be dismissed because he failed to get a certificate of probable cause and because he expressly waived his appellate rights as part of his plea agreement.

We agree with the Attorney General that, under the circumstances of his case, Nava was required to—but did not—obtain a certificate of probable cause in order to appeal. Because we conclude that Nava's appeal must be dismissed on this ground, we do not reach the merits either of Nava's contention that the trial court engaged in plea

bargaining or the Attorney General's alternative argument that Nava's appellate waiver bars our consideration of his appeal.

I. FACTS AND PROCEDURAL BACKGROUND

The facts of Nava's crime are not relevant to this appeal. On April 27, 2017, Nava pleaded no contest to one count of lewd and lascivious acts on a child under the age of fourteen years, in violation of Penal Code section 288, subdivision (a).[1] Nava entered into a written plea agreement that stated that, as a condition of the plea, Nava would not receive a sentence longer than six years in prison. In the "specified waivers" section of the plea agreement, Nava initialed an "appeal and plea withdrawal waiver" that stated "I hereby waive and give up all rights regarding state and federal writs and appeal. This includes, but is not limited to, the right to appeal my conviction, the judgment, and any other orders previously issued by this court. I agree not to file any collateral attacks on my conviction or sentence at any time in the future. I further agree not to ask the Court to withdraw my plea for any reason after it is entered." Immediately following this language, a handwritten notation appears on the plea form that reads, "Except IAC."[2] The written plea agreement was signed by Nava, defense counsel, the court, and an interpreter. Nava signed a provision in the agreement that stated, "I have read, or have had read to me, this form and have initialed each of the items that applies to my case. I have discussed each item with my attorney. By putting my initials next to the items in the form, I am indicating that I understand and agree with what is stated in each item that I have initialed." The interpreter's statement, signed by the interpreter, states that the interpreter translated "the entire contents of the form" in Spanish and "[t]he defendant stated that he or she understood the contents of this form, and then initialed and signed the form."

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[1] All further statutory references are to the Penal Code unless otherwise specified.
[2] We assume that this notation means "except ineffective assistance of counsel."

At the change of plea hearing, the trial court addressed Nava. The trial court stated, "I understand there's been a negotiated disposition reached, Mr. Nava, in which you will be pleading guilty or no contest to Count 1, a violation of Penal Code Section 288(a), and in return you will not be sentenced to more than six years in state prison." After defense counsel informed the trial court that the "low term" for the crime was three years, the trial court stated, "[s]o either three years or six years or, I guess, there'd be a chance you could get probation." The trial court gave Nava a number of advisements about the consequences of a plea of guilty or no contest. The trial court asked Nava if he understood all the terms of the agreement, and Nava replied "[y]es." Nava confirmed that no one had made any promises other than those contained in the plea agreement, no one had threatened him to plead guilty or no contest, and he was not under the influence of a drug, narcotic, or medication.

The trial court then discussed the written plea agreement with Nava. Nava stated that he had reviewed each of the provisions of the plea agreement form with an interpreter. Nava confirmed that he understood each provision of the agreement and had written his initials on the form and had signed it. The trial court reviewed a number of the written plea agreement waivers with Nava. The trial court asked, "Do you give up your right to appeal this conviction?" Nava responded "yes." Nava entered a plea of no contest to the charge of violating section 288, subdivision (a). The trial court stated, "I accept your plea of no contest. I find you guilty of that offense. [¶] I find that you have been fully informed of your rights, that you understand the nature of the crimes charged, the possible penalties and consequences of this conviction, and that you've made a knowing, free, voluntary, and intelligent waiver of your rights."

At the August 15, 2017 sentencing hearing, the trial court indicated that it was "inclined to grant probation" for a term of five years. The People asked that the court sentence Nava to a term of three years in prison. The trial court gave Nava the option of

a "prison sentence" with "full [custody] credits" or a probation term if he waived credits.[3] After consulting with his attorney, Nava (through his counsel) indicated that he was "prepared to waive credits." The court suspended imposition of sentence, placed Nava on probation for a period of five years, ordered him to serve 364 days in the county jail, and awarded him 364 days of credit for time served. Nava agreed to waive 283 days of actual custody credits as a condition of probation.[4] The trial court also imposed a number of other conditions of probation and assessed various fines and fees. On September 14, 2017, Nava filed a notice of appeal. The notice of appeal stated that the appeal is "after entry of a plea of guilty or no contest" and "is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." Nava did not request or obtain a certificate of probable cause for the appeal.

II. DISCUSSION

Nava argues that the trial court engaged in unlawful plea bargaining when it gave him the option of serving either a prison sentence or a probationary sentence with a waiver of custody credits. Nava contends that he is "entitled to a new sentencing hearing without coercion to waive credits" and therefore asks this court to reverse the judgment and remand for resentencing. The Attorney General counters that this court must dismiss Nava's appeal because Nava did not comply with section 1237.5 when he failed to obtain a certificate of probable cause and because of Nava's express waiver of appellate rights in his plea agreement. The Attorney General further contends that the trial court had the

[3] Although the colloquy did not indicate the exact terms of the custody credit waiver, the trial court's actual sentencing of Nava reflects that the trial court was asking Nava to waive any credits in excess of 364 days.

[4] The trial court told Nava, "I'm going to go ahead and sentence you today for credit for time served of 364 days in the county jail, which is 182 actual plus 182 good time/work time credits; so you should be getting out tonight." The trial court asked Nava, "Do you understand that by sentencing you to that you're waiving all of your additional credits? You actually have 465 actual days, for a total credits [sic] of 929. Do you realize you're waiving all of your credits over 364 days for all further purposes." Nava responded, "yes."

discretion to condition a grant of probation on Nava's waiver of custody credits, and that Nava voluntarily waived his entitlement to them.

Nava argues that the waiver of credits was not a part of the plea agreement, and section 1237.5 does not require a certificate of probable of cause for errors related only to sentencing. Nava further maintains that the appellate waiver did not extend to the trial court's sentencing error, which was "unforeseen at the time of the plea agreement." Finally, Nava contends that, even if a defendant ordinarily must obtain a certificate of probable cause to challenge the enforceability of the appellate waiver, this court should nevertheless consider the merits of his appeal because the trial court acted in excess of its jurisdiction when it engaged in "judicial plea bargaining."

We examine the Attorney General's claims first because, if correct, they are dispositive.

As a general matter, "except when sentence is imposed pursuant to a plea agreement, the potential grounds for claims of error in sentencing are the same whether the defendant has pleaded guilty or whether he or she has pleaded not guilty and been found guilty after a trial." (*People v. Johnson* (2009) 47 Cal.4th 668, 678 (*Johnson*).) However, where a defendant has pleaded guilty pursuant to a plea agreement, section 1237.5 imposes a procedural barrier to appeal. Section 1237.5 provides in relevant part that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [and] [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." If section 1237.5 requires that a defendant receive a certificate of probable cause from the trial court but a defendant fails to do so, then the court of appeal should dismiss the appeal without reaching the merits. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099.)

The purpose of the section 1237.5 requirement is "to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas." (*People v. Panizzon*, 13 Cal.4th 68, 75 (*Panizzon*).) The standard by which the trial court must issue a certificate of probable cause under section 1237.5, subdivision (b) (hereafter a section 1237.5 certificate) requires only that the defendant present "any cognizable issue for appeal which is not clearly frivolous or vexatious." (*Johnson*, *supra*, 47 Cal.4th at p. 676, citation and italics omitted.) The section 1237.5 requirement is purely procedural: it "relates to the procedure in perfecting an appeal from a judgment based on a plea of guilty, and not to the grounds upon which such an appeal may be taken." (*People v. Ribero* (1971) 4 Cal.3d 55, 63.) Section 1237.5, therefore, does not limit *what* a defendant who has entered into a guilty plea can appeal—instead it describes the process by which a defendant can secure an appellate ruling on the merits. In other words, section 1237.5 functions as a gatekeeping requirement but does not otherwise limit the scope of appellate review.

These straightforward principles are complicated by exceptions that have been judicially carved out from section 1237.5's broad language. The California Supreme Court has concluded that "two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a [section 1237.5 certificate]: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*Panizzon*, *supra*, 13 Cal.4th at p. 74.)[5] The application of the latter exception, covering "issues regarding

[5] These exceptions have, in turn, been codified in California Rules of Court, rule 8.304(b), which states that, in an appeal "from a superior court judgment after a plea of guilty or nolo contendere," a defendant need not file in the superior court a statement requesting the issuance of a certificate of probable cause "if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4); see *Johnson*, *supra*,

proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed," to decisions made by trial courts during sentencing proceedings has proved particularly complex.

"[T]he general rule [is] that section 1237.5 is inapplicable to sentencing errors arising after a plea is taken." (*Panizzon, supra*, 13 Cal.4th at p. 78.) In addition, section 1237.5 does not apply where the defendant's only claim is that the trial court's sentence contravened the explicit terms of the plea agreement. (*People v. Delles* (1968) 69 Cal.2d 906, 909.) By contrast, a defendant who appeals a sentence that was specifically agreed to in a plea agreement must obtain a section 1237.5 certificate in order to appeal his sentence because, as a practical matter, the claim attacks the plea itself. (*Panizzon, supra*, 13 Cal.4th at p. 73.) On the other hand, if the plea agreement does not specify a sentence but instead articulates a range within which the trial court must sentence the defendant, then the defendant may appeal the trial court's sentencing decision without first obtaining a section 1237.5 certificate. Under these circumstances, "[a]n appellate challenge to the exercise of the discretion reserved under the bargain is . . . a postplea sentencing matter extraneous to the plea agreement [that] . . . does not attack the validity of the plea." (*People v. Buttram* (2003) 30 Cal.4th 773, 777 (*Buttram*).)

Justice Baxter, the author of the majority opinion in *Buttram* and the author of a concurring opinion in the same case, cautioned that the rule articulated in *Buttram*—namely that the defendant need not get a section 1237.5 certificate to appeal a sentence if the plea agreement specifies a sentencing range—depended on the fact that the plea agreement in that case did not contain an appellate waiver. "A prime reason why we conclude here that defendant Buttram may take his appeal without a certificate, and that the Court of Appeal must address it on the merits, is that Buttram's plea is silent on the *appealability* of the trial court's sentencing choice." (*Buttram, supra*, 30 Cal.4th at

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47 Cal.4th at p. 677 fn. 3 ["The requirements of section 1237.5 are implemented by California Rules of Court, rule 8.304(b) . . . ."].)

p. 791, some italics omitted (conc. opn. of Baxter, J.).) Justice Baxter further reasoned that, if the plea agreement had contained an appellate waiver, then "an attempt to appeal the sentence notwithstanding the waiver would necessarily be an attack on an express term, and thus on the validity, of the plea. [Citation.] A certificate of probable cause would therefore be necessary to make the appeal 'operative,' . . . ." (*Id.* at p. 793, italics omitted.)

As Justice Baxter's concurring opinion in *Buttram* indicates, the interaction between the gatekeeping function of section 1237.5 and the waiver of appellate rights pursuant to a plea agreement introduces additional complexity. California courts have concluded that, "[j]ust as a defendant may affirmatively waive constitutional rights to a jury trial, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to counsel as a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement." (*Panizzon*, *supra*, 13 Cal.4th at p. 80.) However, "[t]o be enforceable, a defendant's waiver of the right to appeal must be knowing, intelligent, and voluntary." (*Ibid.*) If a defendant has knowingly, intelligently, and voluntarily entered into a waiver of appellate rights, and the issue the defendant seeks to appeal falls within the scope of the waiver, then a reviewing court must dismiss the appeal without reaching the merits. (See *id.* at pp. 89–90 [ordering the Court of Appeal to dismiss the defendant's appeal where "the terms of the plea bargain preclude any appeal of the negotiated sentence"].) In contrast to the gatekeeping function of section 1237.5, an enforceable waiver of appellate rights restricts the scope of appellate review by precluding review of any subject falling within the scope of the waiver.

Turning to Nava's case, Nava claims that his waiver was not knowing, intelligent, and voluntary because the alleged claim of error—the trial court's conditioning a probationary sentence on Nava's waiver of custody credits—was "unforeseen at the time of the plea agreement." The Attorney General counters that Nava's appellate waiver in

his plea agreement extended to any appeal from the judgment, including this appeal. Before addressing these contending positions, we must first consider the threshold question of the applicability of section 1237.5 to Nava's appeal in light of his failure to get a section 1237.5 certificate.

Following the reasoning of Justice Baxter's concurrence in *Buttram*, a number of courts have concluded that a defendant who challenges an appellate waiver contained in a plea agreement must first secure a certificate of probable cause in order to appeal any issue falling within the scope of the waiver. "[A] defendant who waives the right to appeal as part of a plea agreement must obtain a certificate of probable cause to appeal on any ground covered by the waiver, regardless of whether the claim arose before or after the entry of the plea. Absent such a certificate, the appellate court lacks authority under California Rules of Court, rule 8.304(b) to consider the claim because it is in substance a challenge to the validity of the appellate waiver, and therefore to the validity of the plea." (*People v. Espinoza* (2018) 22 Cal.App.5th 794, 797; *People v. Mashburn* (2013) 222 Cal.App.4th 937, 943 [concluding that the question whether the waiver of the right to appeal is unenforceable is "an issue regarding which appellant was obligated to obtain a certificate of probable cause"].) Based upon these precedents and the logic of the Supreme Court's treatment of section 1237.5 and appellate waivers, we also conclude that, to challenge on appeal an order of the trial court that falls within the scope of an appellate waiver contained in a plea agreement, a defendant must first secure a section 1237.5 certificate.

In his plea agreement, Nava gave up "all rights regarding state and federal writs and appeal," including the right to appeal "the judgment." "In a criminal case, it is the oral pronouncement of sentence that constitutes the judgment." (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324, italics omitted.) In his appeal, Nava attacks the process by which the trial court arrived at the sentence—that is, the judgment. Nava now seeks to argue that the waiver of appellate rights in his plea agreement, an integral part of the plea,

was not knowingly, voluntarily and intelligently made. Furthermore, the sentence the trial court in fact imposed, placing him on probation for five years with the condition that he serve a jail sentence of 364 days, fell within the parameters of the plea agreement, which promised that Nava would not receive a sentence longer than six years in prison.

Under these circumstances, a defendant must secure a 1237.5 certificate in order to appeal. As Nava did not obtain such a certificate, we must dismiss his appeal without reaching the merits of his claim that the trial court engaged in unlawful plea bargaining. We also do not decide the merits of the Attorney General's contention that the substance of Nava's appeal is barred by his appellate waiver.

III. DISPOSITION

The appeal is dismissed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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